Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 30.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

THE BEACON BRASS CO., INC., AND MAURICE FEINBERG, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE BEACON BRASS CO., INC. AND MAURICE FEINBERG.

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Opinion Below.

The memorandum opinion of the District Court was not reported but is found in the Record (R. 5-6).

Jurisdiction.

This appeal was taken by the United States under the Criminal Appeals Act, 18 U.S.C. § 3731, the dismissal in the District Court having been based in part upon the construction of the Federal statute upon which the indictment was founded.

Questions Presented.

(1) Was the indictment found six years next after the alleged offense was committed?

(2) Does the indictment state an offense within the terms of 26 U.S.C. § 145 (b)?

(3) Is the dismissal of a previous indictment for the same offense *res judicata* and so a complete bar to this indictment?

Statutes Involved.

(1) Section 145 (b) of the Internal Revenue Code (26 U.S.C. § 145 (b)) provides:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution."

(2) Section 35 (A) of the Criminal Code (18 U.S.C. (1946 ed.) § 80; now 18 U.S.C. § 1001) provides, in pertinent part:

> ". . . whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, re-

ceipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States . . . , shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

(3) Section 3748 (a) of the Internal Revenue Code (26 U.S.C. § 3748 (a)) provides in part:

"No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

"(1) . . .

"(2) for the offense of wilfully attempting in any manner to evade or defeat any tax or the payment thereof, and . . ."

Statement.

(1) On March 16, 1951, an indictment was returned against the appellees, Beacon Brass Company, a corporation, and Maurice Feinberg, its president and treasurer, in the District Court for the District of Massachusetts. The indictment charged that, in violation of Section 145 (b) of the Internal Revenue Code (*supra*, p. 2), the appellees had wilfully and knowingly attempted to defeat and evade a large part of the taxes due and owing by the corporation for the fiscal period ending October 31, 1944, by making

false and fraudulent statements and representations at a hearing before Treasury Department representatives on October 24, 1945, and on other occasions thereafter, concerning payments and disbursements made by the corporation *for the purpose of supporting, ratifying, confirming and concealing the fraudulent and incorrect statements and representations made in the corporate tax return of the corporation for the fiscal period ending October 31, 1944, filed on or about January 5, 1945* (R. 7, 8).

(2) On April 6, 1951, the appellees filed a motion to dismiss on the following grounds:

(*a*) That the indictment was not found within six years next after the alleged offense was committed.

(*b*) That the indictment is duplicitous in that it charges violation of 26 U.S.C. §145 (b), and 18 U.S.C. § 80 (R. 9).

(3) On April 27, 1951, after hearing evidence, Sweeney, Ch. J., ordered the indictment dismissed. In its memorandum the court found that the indictment was duplicitous and that the statute of limitations had run. As to the latter ground, the court found as a fact, after hearing evidence, that the corporate return was filed on January 15, 1945; that the six-year statute of limitations commenced to run on that date; that since the indictment was not returned until March 16, 1951, the statute of limitations had run and "could not be revived by the mere charge of subsequent false statements" (R. 10, 11).

(4) On May 28, 1951, the United States filed notice of appeal (R. 11), and on June 11, 1951, designation of record (R. 11). On June 29, 1951, however, the United States filed a stipulation withdrawing its appeal (R. 12).

(5) On September 14, 1951, a second indictment was returned against the appellees, again charging a violation of section 145 (b) by the corporation for the same fiscal year ending October 31, 1944. The only difference is that in this second indictment no reference is made to the filing of the corporate tax return on or about January 5, 1945, except by implication from the use of the words "additional unreported net income" (R. 2).

(6) On November 23, 1951, the appellees again filed a motion to dismiss, setting forth as grounds for dismissal:

(*a*) That the indictment was not found within six years next after the alleged offense was committed;

(*b*) . . .

(*c*) That the indictment does not state an offense within the terms of 26 U.S.C. § 145 (b) (R. 3).

(7) On December 4, 1951, there was a hearing on appellee's motion to dismiss before McCarthy, J., at which time the entire record relating to the prior indictment, including Judge Sweeney's findings of fact, was put into evidence.

(8) On January 10, 1952, the court again dismissed the indictment. In the memorandum the court adopted the finding of Sweeney, Ch. J., that the statute of limitations had run. Further, the court said: "The only difference, therefore, between this indictment and the [prior] indictment . . . is that no mention is made here by the Government of the fact that the Corporation filed its tax return in January of 1945." As an additional reason the court held that the act alleged in this indictment was not such an act as was contemplated by the provisions of Section 145 (b).

Summary of Argument.

I. THE ALLEGED CRIME OF TAX EVASION WAS COMPLETE ON JANUARY 15, 1945, THE DAY THE CORPORATE TAX RETURN WAS FILED, AND HENCE THE STATUTE OF LIMITATIONS HAS RUN.

The court found as a fact that the corporate tax return was filed on January 15, 1945. The Government in the first indictment charged that the appellees wilfully attempted to evade taxes by filing a false return on that date. The cases hold that the crime of tax evasion was then complete and so the statute of limitations starts to run. Any indictment returned after January 15, 1951 is barred.

II. THE INDICTMENT FAILS TO STATE A CRIME WITHIN THE PROVISIONS OF 26 U.S.C. § 145 (b).

A. False statements do not constitute a crime within the provisions of Section 145 (b).

False statements by themselves are not the affirmative conduct required by Section 145 (b).

B. The false statements as made in the case at bar do not come within the provisions of Section 145 (b).

In view of the findings of fact and the history of the previous indictment, the false statements in the case at bar do not constitute a crime under Section 145 (b).

III. THE DISMISSAL OF THE EARLIER INDICTMENT IS A COMPLETE BAR TO THIS INDICTMENT FOR THE SAME OFFENSE.

Sweeney, Ch. J., dismissed the prior indictment on the grounds that the statute of limitations had run. The statute of limitations is a plea to the merits and, once decided, it cannot be reopened in a later prosecution.

Argument.

I. THE ALLEGED CRIME OF TAX EVASION WAS COMPLETE ON JANUARY 15, 1945, THE DAY THE CORPORATE TAX RETURN WAS FILED, AND HENCE THE STATUTE OF LIMITATIONS HAS RUN.

The corporate tax return was found by the court to be filed on January 15, 1945. This indictment was returned on September 14, 1951.

The cases under section 145 (b) are clear that, whenever the taxpayer wilfully files a fraudulent return with intent to defeat a part or all of the tax, the crime is complete as soon as the filing takes place. *Guzik* v. *United States*, 54 F. (2d) 618; cert. den. 285 U.S. 545.

In the *Guzik* case the court said, at page 619: "The contention is made and is here rejected, that an assessment of the deficiency tax due is necessary before the taxpayer can be prosecuted criminally for the charges preferred. The crime is complete when the violator has, as in this instance, knowingly and wilfully filed fraudulent returns with intent to evade and defeat a part or all of the tax."

In *Cave* v. *United States*, 159 F. (2d) 464, the defendant contended that an indictment charging him with filing a false and fraudulent return on January 15, 1945, was insufficient to sustain a conviction, on the ground that, since his tax was not due until March 15, there could be no criminal attempt to defeat or evade prior to that time. The court said, at page 467, that the defendant's argument was fallacious. "A taxpayer whose returns are made on a calendar year basis may file his return with the Collector on or before the 15th of March following the close of the calendar year, Sec. 53 (a)(1) Internal Revenue Code, 26 U.S.C.A. Internal Revenue Code Sec. 53 (a)(1); and the tax shall be paid on the fifteenth day of March following the close of the calendar year, Sec. 56 (a)"; and "it may

be paid . . . prior to the date prescribed for its payment, Sec. 56 (d). The crime denounced by Sec. 145 (b) of wilfully attempting to defeat or evade the tax is complete when the taxpayer wilfully and knowingly files a false and fraudulent return with intent to defeat or evade any part of the tax due the United States."

The law, then, is clear that in the case at bar the crime was complete when the defendant filed the alleged fraudulent return. Indeed, an examination of the two indictments shows beyond any doubt the purpose of the Government in bringing the second indictment. As already noted, the Government actually instituted an appeal from this court's decision which dismissed the first indictment, No. 51-55, on the grounds that it was duplicitous, and that the statute of limitations had run. Subsequently, this appeal was withdrawn, and a new indictment was brought, in which the substance of the charge was not changed one iota, merely the wording. The Government seems to feel that, by eliminating in the indictment any reference to the fact that the corporation did actually file its tax return on January 15, 1945, it gets away from the cases that hold that the crime is complete on that date. The fact that the corporate return was filed on January 15, 1945, was in evidence before both judges.

Now the defendant does not dispute that Section 145 (b) contemplates that many methods can be used to accomplish the crime. Nor would the recitation in one count of several methods used be duplicitous. But, as noted above, when the defendant wilfully filed the false return, the crime was complete. So, when the Government in its frantic effort to keep the statute from running charged the defendants with making false statements in October, 1945, it charged, if anything, a violation of 18 U.S.C. § 1001.

To follow the Government's position to its logical conclusion indicates that the statute of limitations would in

effect never run. A defendant in his desire to escape prosecution is bound to do or say something that would keep the statute running according to the Government's interpretation. Clearly, under the cases the crime of tax evasion in the case at bar was complete upon the filing of the return. By setting out the alleged perjury on October 24, 1945, the Government charged another crime, and this subsequent and different offense certainly does not toll the statute, which expired on January 15, 1951.

II. The indictment fails to state a crime within the provisions of 26 U.S.C. § 145 (b).

A. False statements do not constitute a crime within the provisions of Section 145 (b).

Section 145 (b) provides that a taxpayer may be prosecuted for having wilfully attempted "in any manner to evade or defeat any tax." In *Spies* v. *United States*, 317 U.S. 492, the Court pointed out that the affirmative, wilful attempt necessary under Section 145 (b) may be inferred from conduct, such as keeping a double set of books, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the same kind, the likely effect of which would be to mislead or conceal. Obviously, the use of the words "in any manner" is intended to be a comprehensive concept, but it definitely requires *affirmative* conduct on the part of the taxpayer. False statements made to Treasury Agents are not affirmative conduct in this sense. It is rather an effort in a negative sense to cover up affirmative conduct that has already occurred. The false statements go to the wilfulness of the affirmative conduct. They would be evidence for the Government in proving that the affirmative con-

duct (whatever it was) was wilful. Standing by themselves, false statements do not qualify for the *affirmative* conduct required by Section 145 (b). A close examination of all tax fraud cases, moreover, fails to disclose any prosecution on the sole ground of fraudulent statements made to Treasury Agents such as is set forth in the case at bar. The defendant submits that the act of lying to the Treasury Agents as is alleged in this indictment is not such an act as was contemplated by the provisions of Section 145 (b).

B. The false statements as made in the case at bar clearly do not come within the provisions of Section 145 (b).

The District Court in its memorandum concluded "that the act alleged in this indictment is not such an act as was contemplated by Section 145(b)" (R. 6). In reading this statement it should be borne in mind that the statement was made in view of the evidence before the court. There was in evidence a finding of fact that the corporate tax return had been filed on January 15, 1945. There was also in evidence the previous indictment in which the Government charged this corporate tax return had been filed on January 15, 1945, by the appellees wilfully with knowledge of its falsity. Finally, there was in evidence the complete history of the previous criminal indictment, including the stipulation finally withdrawing the Government's appeal. In view of all this evidence, the court's conclusion that "the act alleged" does not fall within the terms of Section 145 (b) is clearly right. The crime was complete when the false statements were made, and the Government is simply using the false statements in this case to try to keep the statute of limitations running. It is submitted that the false statements under the circumstances as made in the case at bar are not a crime within Section 145 (b).

III. THE DISMISSAL OF THE EARLIER INDICTMENT IS A COMPLETE BAR TO THIS INDICTMENT FOR THE SAME OFFENSE.

This appeal arises under the provisions of the Criminal Appeals Act (18 U.S.C. § 3731), permitting direct appeal where the dismissal in the court below was based on the construction of a statute. The Court has, however, been reluctant to construe a statute where such is not necessary to the determination of the case. Cf. *United States* v. *Borden Co.*, 308 U.S. 188. Appellees then feel that it is appropriate to point out to the Court that the defense of *res judicata* is available to them, that it is not among the defenses and objections covered by Rule 12 (b) (2), which must be raised before trial, and that it has, therefore, not been waived. It is also perhaps appropriate to state that a dismissal based on *res judicata*, being a bar to the action, is one which may be taken to the Supreme Court on direct appeal and is therefore more suitable for the Court's present consideration than another defense might be.

The doctrine of *res judicata* is applicable to criminal as well as to civil litigation, especially as to matters which were previously decided and not merely open to argument. *United States* v. *Oppenheimer*, 242 U.S. 85.

As has been pointed out, the two indictments charge the identical acts with being violations of section 145 (b); they differ only as to the purposes alleged. However, in both it is clear that the ultimate purpose was the evasion of taxes owing by the Beacon Brass Co., Inc., for the fiscal period ending October 31, 1944, and in both it is clear that a tax return had been filed which did not report all the income. The United States in this appeal states the question to be:

> "Whether a willful attempt to evade and defeat taxes by making false and fraudulent statements and representations to representatives of the United

States Treasury Department violates Section 145 (b) of the Internal Revenue Code . . .''

This is the exact question decided by the memorandum opinion and decision dismissing the first indictment as it is the basis for the conclusion that the indictment was duplicitous.

The indictment was duplicitous in charging both a violation of Section 145 (b) and also a violation of Section 35 (A) of the Criminal Code (18 U.S.C. § 1001); in the words of the memorandum, ''a violation of 26 U.S.C.A., 145 (b), plus the making of false statements . . .'' This duplicity is not a technical defect which the Court can overlook, as the finding of duplicity is necessarily based on a finding that the making of such false statements is not a violation of section 145 (b).

> ''Coming to the question whether the indictment was duplicitous, it is well settled that duplicity in criminal pleading is the joinder of two or more separate and distinct offenses in the same count in an indictment or information, not the charging of a single offense involving a multiplicity of ways and means of action and procedure. The offense charged in each count of this indictment was the devising of a scheme to defraud, and for obtaining money or property by means of false and fraudulent pretenses, representations, and promises, and of using the mails for the purpose of executing the scheme or attempting so to do. It was a single offense consisting of those two elements. The scheme, as laid out in the indictment, involved a multiplicity of ways and means of action and procedure, but it was a single scheme. And setting out the numerous ways and means of action and

procedure included in the scheme for its accomplishment did not render the indictment duplicitous."

United States v. *Crummer*, 151 F. (2d) 958, 963, 964 (1945); cert. den. 327 U.S. 785.
Cf. *Frankfurt Distilleries* v. *United States*, 144 F. (2d) 824, 832.

If, therefore, the false statements to the Revenue Agents were elements of the violation of Section 145 (b), the indictment would not have been duplicitous, and a necessary implication of the decision is that the false statements did not violate Section 145 (b), but violated only Section 35 (A) of the Criminal Code.

However, the lower court did not decide only that the earlier indictment was duplicitous; it was also decided that the statute of limitations had run. "The six year statute of limitations against the filing of a false return in violation of 26 U.S.C.A. Section 145 (b) commenced to run on that date. The indictment in this case was not returned by the Grand Jury until March 16, 1951, which is well over the six year period." And, in conclusion, with especial reference to the false and fraudulent statements, the court stated: "The statute of limitations having run, the action could not be revived by the mere charge of subsequent false statements." This brings this case squarely within the precedent of the *Oppenheimer* case, in which the Court stated:

"Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea

of the statute of limitations is a plea to the merits, *United States* v. *Barber*, 219 U. S. 72, 78, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution." (242 U.S. at 87, 88.)

Conclusion.

For the reasons stated, the judgment of the District Court dismissing the indictment should be affirmed.

Respectfully submitted,

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